No. 72-970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ASSOCIATED CULTURAL CLUBS, INC., ET AL.,
Petitioners,

v.

MONARCH TRAVEL SERVICES, INC., ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF FACTS

How This Case Arose

It may be helpful to the Court if we explain how this case arose. For a number of years travel agents have seen a significant part of their business diverted from scheduled air services (on which the retail selling agents receive a commission) to charter services (on which they do not). When this happens by charter programs which comply with law, the travel agents must accept it. But when it happens through violations of the Federal Aviation Act and CAB regulations, the legitimate travel agent is in an intolerable position: he cannot compete

without likewise breaking the law, and the most convenient remedy, asking the CAB to stop the black marketeers, has in practice not been effective, due to budgetary limitations on the Board's enforcement machinery. As the CAB's representative, Mr. Edison, said in this case,[1]

> "I would like to confirm Mr. Hobbs' statement that the Board is hopelessly understaffed, and, as a matter of fact, we just can't keep up with the work that comes in."

In the spring of 1971, allegations came to the attention of several California travel agents (respondents) that one Associated Cultural Clubs, Inc. (ACCI), one of the petitioners, was selling charter seats to Europe by means of direct mail addressed to the general public, and that when the prospective passenger would come in, the ACCI salesgirls would issue him a "membership card," falsely backdated to represent compliance with the CAB's six-months rule (see p. 5 below). If true, it appeared that the travel agents could have the violations enjoined under Sec. 1007 (a) of the Federal Aviation Act (quoted at p. 8 below).

In April, 1971, the travel agents decided to engage a private investigator to look into the truth of the allegations, and his initial reports fully verified the allegations, whereupon the travel agents hired additional investigators and proceeded to work up a full case for presentation to a court.

Time was short, because ACCI's summer flight schedule was to begin on May 18.[2] The travel agents hoped to file suit no later than May 14, 1971, and to minimize incon-

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[1] Tr. 6/1/71, p. 31. See also District Court opinion, App. A *post*, Tr. 104.

[2] The printed flight schedule circulated by ACCI listed 43 separate one-way and round-trip flight combinations departing from Los Angeles. The first flight was scheduled to leave Los Angeles May 18, 1971, and the last return was scheduled for October 12, 1971.

venience to the passengers, to try to enjoin all flights leaving June 15 or after. They realized that they would have no remedy for the unfair and illegal competition unless they were able to enjoin the flights before they departed. There was certainly no point in looking for an injunction long *after* the flights had left, and any remedy in damages was illusory. This case would be won or lost on preliminary injunction.

Some 13 affidavits of investigators and others were drawn up, points and authorities prepared, and suit filed on May 14, 1971. Extensive pretrial depositions of two of the defendants and a third party witness were taken on May 26 and 27, and a hearing on the preliminary injunction was held on June 1, 1971. At the hearing the District Court considered both sides' affidavits, depositions, briefs and arguments, and took the matter under advisement.

On June 4, 1971, the District Court held another hearing, at which it took live testimony, and then issued its opinion from the bench, reprinted as Appendix A hereto. The findings are entirely in favor of the travel agents' allegations and arguments, and the court accordingly issued the preliminary injunction substantially as sought by the travel agents.[3]

What The Facts Show

The record shows beyond any doubt that ACCI was engaged in a plan to deceive the public and the CAB by pretending to be a bona fide club or association. The CAB regulations, and the deceptions practiced by petitioners to evade them, are as follows:

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[3] However, he did not make the injunction effective until July 13, which permitted some flights after June 15 to depart. He also required the travel agents to post a $100,000 bond against any damages defendants might suffer in event the injunction was ultimately proved wrongful.

1. First, the CAB rules allow a representative of a club to charter an aircraft for the club, but not where the representative is a person whose business is the sale of transportation.[4] The record shows that ACCI made the charter contracts in its own name, and yet the record shows clearly that ACCI was not a bona fide club, but a charter promoter. The District Court found (see Appendix A *post*, Tr. 100-101):

> "This defendant is not acting as an agent for the passengers. . . . It engages, it hires a plane. . . . And once having done so, it seeks to find members of the public that it can put on the plane that it charters. No doubt about that either. . . . Certainly the business of this organization is the formation of groups."

2. Club charters are not supposed to be open to the general public, so the CAB regulations provide that the passengers on the charter "may not be brought together by means of a solicitation of the general public." 14 C.F.R. § 207.40(b). Notwithstanding this, the record is clear that ACCI assembled its charter groups by means of public solicitation, to wit: by mailing to names on ordinary commercial mailing lists.[5] The same rule provides that the passengers "may be solicited only from among the bona fide members of an organization, club, or

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[4] 14 C.F.R. § 207.11(c)(2) allows a charter "By a person (no part of whose business is the formation of groups . . . or the solicitation or sale of transportation services), for the transportation of a group of persons as agent or representative of such group . . . ." The purpose of this rule is to exclude charters to travel agents who are selling public air transportation through the guise of club charters, which is what ACCI was doing.

[5] The affidavit of Mr. Pendry, one of plaintiffs' hired investigators, says that he was told by one of the defendants that they made a 20,000 mailing every six weeks, using a list rented from a commercial mailing house. The deposition of Mrs. Banner, an employee of the mailing house, corroborates this. See also affidavit of Messrs. Gaffey, Roosekrans, and Cser, who were addressees of the mailings.

other entity . . . ." Obviously solicitation of sales through commercial mailing lists is in violation of this rule. The District Court found that ACCI "seeks to find members of the public that it can put on the plane that it charters" (App. A *post*, Tr. 100), and is "transporting members of the public" (App. A *post*, Tr. 101).

3. Probably the most important CAB rule of all, because of its basic simplicity and the near impossibility of violating it except intentionally, is the one which requires that the passengers on a club charter be members of the club—

> "for a minimum of six months prior to the starting flight date." 14 C.F.R. 207.40(b)(2).

Notwithstanding this, ACCI freely sold charter seats to all who applied, without any regard to the six-months rule, other than to take care that the passenger's application blank was falsely marked "renewal," and that a membership card was issued bearing the stamp "Expires 12-31-1971," in order to make it falsely appear that the passenger had been a member since at least December 31, 1970.[6] In an understatement, the District Court found "a strong likelihood that the organization does not undertake to enforce the six-months requirement" (App. A *post*, Tr. 102).

4. Defendants made their sales in direct violation of several other rules, *e.g.* the rule that one-way flights are prohibited,[7] that the cost is required to be prorated equally

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[6] The affidavits filed below show conclusively that ACCI would sign up for its charters anyone who walked in off the street, without any regard to the six-month rule, and would falsify the "membership card." One affidavit (Pendry) suggests that they even accepted a new passenger minutes before flight time.

[7] When a charter program involves more than four round trips, as defendants' program did, one-way passengers are prohibited. 14 C.F.R. § 207.41. Notwithstanding this, defendants freely advertised and sold one-way tickets to all who desired them. See, *e.g.*, affidavits of Pendry, Ingle and Phelps.

among the passengers,[8] and the rule that only "immediate family" can accompany the club member.[9]

5. Finally, CAB regulations, 14 C.F.R. § 207.47 require the charterer to file with the carrier in advance of the flight a "Warranty", *on pain of criminal penalty for misrepresentation*, as follows:

> "I, (name) represent and warrant *that the charterer has acted* with regard to this charter operation (except to the extent fully and specifically explained in Part II, Section B), and will act with regard to such operation, *in a manner consistent with Part 207 of the Board's Economic Regulations.* I (we) further represent and warrant that the charterer has not offered charter flights simultaneously with the solicitation of membership in the chartering organization in any mass media advertising or notice *or through direct mailing* or public posters. I (we) further represent and warrant that all charter participants have been informed of eligibility and cost requirements of Part 207 and that a flight may be canceled if ineligible participants are included." (Emphasis added)

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[8] The costs of the charter flights are required to be "pro-rated equally among all charter passengers," and the charterer "shall not make charges to the charter participants which exceed the actual costs incurred in consummating the charter arrangements. . . ." 14 C.F.R. § 207.43(a) & (b). In other words, the club is not allowed to make a profit on the member's payment. Notwithstanding, ACCI advertised a single flat price for the charter seats which was fully intended to return a profit to ACCI from its customers' payments. The District Court so found, App. A. *post*, Tr. 101. It is noted that ACCI paid $122.50 for each round-trip seat, there were 189 seats per plane, and it contracted for 25 planes. It sold the seats for about $275 each.

[9] 14 C.F.R. § 207.42, defines a member's "immediate family" as those living in his household. Notwithstanding this, ACCI signed up persons as "immediate family" that it well knew were not living in his household. See Pendry affidavit, showing that ACCI accepted the applicant's mother who lived in another city.

Obviously, if ACCI filed the required certificate, it was false.

ACCI claimed that its passengers comprised a bona fide group, because there were some cultural aspects. The kind of culture that ACCI had in mind is revealed by the Pendry affidavit (R. 96):

> "Paula Blythe [a defendant] stated 'The Club would have a "social" occasionally. Maybe a travel movie, but that it isn't really that important because hardly anyone attends and because the real purpose is to take advantage of their low travel fares.'"

The District Court found (App. A *post*, Tr. 102):

> "And at least from a tentative standpoint, any [cultural] activities that the group has are only incidental, and are only for the purpose of giving a color of authenticity as far as group aspect is concerned."

The above facts show that ACCI and its officers are engaged in wholesale violation of CAB regulations applicable to what ACCI pretends to be, namely, a bona fide club. But since ACCI is really a charter promoter, not a club, these regulations are not applicable to ACCI. In fact, no regulations are applicable to ACCI, because the CAB does not allow (and cannot, under law, allow) such operations to be carried on, whereby a charter promoter, as principal, charters planes and retails the seats to the public. This is acting as an indirect air carrier (see note 13 below), and is in violation of Sec. 401(a) of the Federal Aviation Act, 49 U.S.C. § 1371(a), which provides:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

It has no certificate from the CAB [10] or the equivalent [11] and therefore it is subject to injunction under Sec. 1007(a) of the Act, 49 U.S.C. § 1487(a), which provides:

> ". . . in the case of a violation of section 401(a) of this Act, *any party in interest* may apply to the district court of the United States . . . and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process . . . ." (Emphasis added)

It was on the strength of its finding that ACCI was an "indirect air carrier," and hence in violation of Sec. 401(a) for want of a certificate or exemption, that the District Court issued the preliminary injunction.

The Court of Appeals for the Ninth Circuit affirmed, holding that the travel agents had standing; that ACCI was an indirect air carrier and hence required to have a certificate or exemption, and that the CAB's charter regulations did not infringe the constitutional right to travel.

From this decision ACCI seeks certiorari.

Postscript To Statements Of Facts

The petition contains a number of misstatements and unsupported assertions. For example, they claim (Pet. 4) that there are 11,000 "members" of their "club", and imply that these are mainly "students and professors".

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[10] While not directly relevant to this case, we would point out that what defendants are doing is not only contrary to the Act because done in absence of a certificate, but is an activity which the CAB could not lawfully authorize by certificate or exemption, as it is "individually ticketed" service, not "charter" service. See, *e.g., Pan American World Airlines* v. *CAB*, 380 F.2d 770 (2d Cir. 1967), aff'd 4-4, 391 U.S. 461.

[11] The Board could authorize an indirect air carrier to operate under an exemption instead of a certificate. 49 U.S.C. § 1301(3). However, no exemption was sought or granted in this case.

The figure of 11,000 is incredible, and there is no evidence that the "members" were anything but former customers of ACCI. As to "students and professors", the evidence is that petitioners ran a shop on Wilshire Boulevard and sold seats to any member of the public who wanted them, student or otherwise. Of the sales on the record in this case, none were to students.

Petitioners claim (Pet. 5) that respondents are "apparently backed by the large air lines, or some of them, who posted a bond of $100,000 to cover damages to petitioners and others." This is false.

They say (Pet. 25) that several hundred "students and teachers" were stranded in London because of the injunction. They fail to mention that they continued to operate charters to Europe after the injunction deadline of July 13. See affidavits 25, 26, 27, 28 (Schwartz, Psik, Phelps, Pendry). They continued to spend funds from their bank account on their own expenses, in violation of the injunction, affidavit no. 29 (Francis), but refused to make refunds to passengers whose flights were cancelled, affidavit no. 24 (Sherman), in violation of the injunction. This did not stop until the California Attorney General's Division of Consumer Fraud obtained a state court order freezing their bank account.

REVIEW SHOULD NOT BE GRANTED

The facts show that ACCI was running a black market airline to Europe, in violation of CAB regulations and the Federal Aviation Act.[12] The main question of law was whether ACCI was an "indirect air carrier," so as to be subject to the requirements of the Act. Under CAB and judicial precedents, the answer is clearly yes,[13] and the

[12] 72 Stat. 731, 49 U.S.C. §§ 1301-1542; 14 C.F.R. Parts 207, 208, 212, 214.

[13] *Railway Express Agency, Grandfather Certificate*, 2 CAB 531 (1941); *Consolidated Flower Shipments, Inc.-Bay Area, Violation,*

District Court and the Court of Appeals so held. The CAB entered the case as *amicus* before both courts, supporting the travel agents' position that ACCI was an indirect air carrier. No new principle is involved requiring imprimatur by this Court, nor any conflict requiring resolution.

Two secondary questions were (1) whether the three travel agents had standing to sue, and (2) whether the CAB regulations are an infringement on the Constitutional right to travel,[11] in that they do not make low-cost charters freely available to any single passenger who would like to fly somewhere.

That the travel agents had standing seems obvious (every diverted passenger represented a lost commission), and the District Court and the Court of Appeals so found. The "right to travel" issue is frivolous, and the Court of Appeals summarily disposed of it; the District Court did not consider it worthy of attention (see App. A, *post*). We point out that the charter regulations are mere background; the primary reason ACCI was enjoined was because they violated the Federal Aviation Act by not having a certificate or an exemption.

ACCI now raises another question, whether the "primary jurisdiction" rule required that the District Court refuse to entertain this case until the CAB had passed on the question whether ACCI was an indirect air carrier. ACCI failed to brief this issue in the Court of Appeals,

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16 CAB 804 (1953), aff'd 213 F.2d 814 (9th Cir. 1954); *Hacienda Hotels-Motels, Rooms & Flight Reservations, Inc. and U.S. Aircoach Enforcement Proceeding*, 26 CAB 372 (1958); *Dunes Hotel and Casino Enforcement Proceeding*, 33 CAB 1 (1961), aff'd 308 F.2d 49 (9th Cir.); *Las Vegas Hacienda*, 31 CAB 415 (1960), aff'd 298 F.2d 430 (9th Cir. 1962), cert. den. 369 U.S. 885; *Railway Express, Air Surface Cargo Agreements*, 39 CAB 860 (1964), aff'd 345 F.2d 445 (D.C. Cir. 1965), cert. den. 382 U.S. 879.

[11] See *Kent* v. *Dulles*, 357 U.S. 116 (1958).

and that Court did not pass upon it, so it really is not an open issue here.

There is no good reason to apply the "primary jurisdiction" doctrine[14] where, as here, the question does not require special expertise to understand,[15] and especially where the Agency's position is already known,[16] and the Agency itself recognizes that the doctrine does not apply.

It is true that the Eastern District of New York elected to apply the primary jurisdiction rule in *CAB* v. *Aeromatic Travel Corp.*,[18] but that court considered that application of the rule is entirely discretionary with the court,[19] and the court obviously felt, under the particular circumstances of that case, that a prior decision by the CAB would be helpful. Equally obviously, the District Court in the instant case did not feel it needed further elaboration from the Board to resolve the question of injunction. Both views are reasonably tenable, and not inconsistent.[20] We note that in the *Aeromatic* case, there had not yet been an evidentiary hearing, so the court did not have the benefit of knowing what the facts were when it ruled, unlike the instant case, where the court did not

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[14] Discussed in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64 (1956); Davis, *Administrative Law* § 19.01 (1958).

[15] See *World Airways* v. *Northeast Airlines*, 349 F.2d 1007, 1010 (1st Cir. 1965), a case similar to the instant case, where the primary jurisdiction rule was held not applicable.

[16] See cases cited at note 13 above. The CAB entered the case as amicus before the District Court and the Court of Appeals, supporting the travel agents' argument that ACCI was an indirect air carrier.

[18] 349 F. Supp. 1151 (E.D.N.Y. 1972).

[19] "A court's power to defer an issue or case under the primary jurisdiction doctrine is purely discretionary. . . ." 349 F. Supp. at 1155.

[20] The court in the *Aeromatic* case felt that the instant case was distinguishable. 349 F. Supp. at 1156, n. 19.

rule until after the evidentiary proceedings were concluded.

This suit was brought by small private businessmen who were being injured by petitioners' flagrantly illegal operations. The Civil Aeronautics Board, unable for lack of manpower to look into these violations itself, entered this case as amicus and supported the travel agents. The District Court and the Court of Appeals readily found for the travel agents. The time has come to put an end to this litigation and to the expense entailed.

CONCLUSION

The writ should not be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Civil No. 71-1176 WPG

TRANSCRIPT OF JUNE 4, 1971, OF THE BENCH OPINION OF JUDGE WILLIAM P. GRAY, U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(Tr. 100-106)

[100] All right. The Court concludes that this defendant did and does engage indirectly in air transportation. It, on its own behalf, charters an airplane for a price. That is certainly evident in the contract with Donaldson.

This defendant is not acting as an agent for the passengers. They are not putting the passengers in touch with the air carrier like a normal travel agent does. It engages, it hires a plane. It says so. The company will let and the charterer will hire the aircraft for a specific price. And once having done so, it seeks to find members of the public that it can put on the plane that it charters. No doubt about that either. The brochures indicate that. The individual applicants indicate that. Even Mrs. Blythe's own testimony—as an example, Mr. Pendry [101] when he came in, she wrote him a reservation on a particular flight. So that in that sense the defendant is transporting people in airplanes that it hires and transporting members of the public. I'll come to that in a minute.

It is not a representative of a legitimate group for a charter flight within the meaning of 14 CFR 207.11, Subsections (b) and (c). Those subsections require, among other things, that the person engaging the aircraft be a person no part of whose business is the formation of groups. Certainly the business of this organization is the formation of groups.

". . . or the solicitation or sale of transportation services,"

which is exactly what they are doing.

And also there is another provision that no profit can be made by the group that constitutes the charter party. This, of course, is not true here. These people are engaged in the business of selling air transportation to members of the public.

And also, I am not persuaded—although I don't make any specific finding on this—but I think there is a strong indication that members are not bona fide members of any group other than for the purpose of getting air transportation.

[102] There may be some cultural activities once a person gets aboard, but if so, the availability of this is just incidental. I find that not a valid purpose to make a bona fide group apart from the air transportation. And at least from a tentative standpoint, any activities that the group has are only incidental, and are only for the purpose of giving a color of authenticity as far as group aspect is concerned.

Also I find a strong likelihood that the organization does not undertake to enforce the six months requirement. The testimony of Mrs. Blythe with respect to Mr. Pendry is an example of significance. The other affidavits give a similar indication.

And certainly, the organization, as I said before, is not acting as agent for any group. It is forming the group, and it makes its profit from the group. Nor is the organization the agent of a carrier. It is an arms-length contracting party with the carrier, and from that standpoint is not simply a ticket agent.

I was impressed with the C.A.B.'s definition of an indirect air carrier as contained on page 3 of the C.A.B.

brief which sets forth the Board's view as contained in the case of Hacienda Hotels v. U. S. Aircoach Enforcement Proceeding [26 CAB 772 (1958)]. An indirect air carrier is defined as:

> "A person not directly engaged in the [103] operation of aircraft, being an indirect carrier if such person sells transportation by aircraft to the general public, other than an authorized agent of a direct carrier in the consummation of transportation arrangements between the operator of the aircraft and the passengers."

This is exactly what these people do. They sell transportation by aircraft to the general public. They are not doing so as an authorized agent of a direct carrier, and they are not doing so in the consummation of transportation arrangements between the operator of the aircraft and the passengers. There are no arrangements between the operator of the aircraft and the passengers.

The operation of the defendant organization is much like that of a freight forwarder as described in the case of American Airlines v. C.A.B. at 178 Fed. 2d 903, Seventh Circuit, in 1949. And also much like the Consolidated Flower Shipment v. C.A.B. In all three instances the business of the company is to gather together either articles or passengers, form them in a group, and buy the space in the airline in which either passengers or articles may be shipped. And also make as its profit the difference between the charge for the transportation of the people or articles and the amount that the actual carrier [104] requires.

So the Court finds that the defendant is an air carrier and, by acknowledgement in the deposition of Mrs. Bopp, it is operating without a certificate from the C.A.B. as prohibited under Section 1371(a) of Title 49.

That being the case, Section 1487(a) provides that the C.A.B. could bring the action. But, as was stated here in this matter by the C.A.B. representative, and as was acknowledged in the case of [North] Eastern Airlines, [413 F.2d 335 (1st Cir. 1969), and connected cases] the C.A.B. can't bring all actions immediately, and Congress must have intended that under certain circumstances any party in interest may bring the action, and that was done—and in one of those instances—in fact, the only instance is the case of a violation of Section 1371(a), that is, a carrier operating without a certificate, which is the situation here.

I find that the fact that the C.A.B. could bring the action does not preclude other people who come within the statute being able so to do. Otherwise, there is just no meaning to the statutory provision I just referred to.

So the next question is whether or not the plaintiffs here and the travel agents on behalf of whom they seek to bring this action are parties in interest.

Well, the World Airways v. Northeast Airlines [105] cases in the First Circuit [413 F.2d 335 et al.] certainly are strong precedent to the effect that an actual air carrier with whom these so-called charter flights compete are parties in interest because transportation is directly diverted from them to the charter flight carriers in question and, in fact, it even goes farther than that. There is some even indirect effect, namely, whatever effect there is is the difference between taking a vacation in Hawaii and going to Miami.

So that there is no doubt but what, if the plaintiffs here were an actual direct air carrier, that such carrier would have standing as a party in interest.

Now, here the people are not direct air carriers, but are travel agents and, of course, there is no doubt but what, if business is diverted from an actual airline, it is

to some extent diverted from travel agents, because the Court will take judicial notice of the fact that many passengers who book passage on airlines do so through travel agents. It is a lesser extent but a substantial extent. At least it is substantial, comparable to the comparison between an Hawaii charter flight and the effects of it upon Miami vacations as is set forth in the World Airways case.

So the Court holds that the plaintiffs and the other travel agents on behalf of whom this action is brought are parties in interest within the meaning of the statute. [106] Their interest is not as great as that of the airlines, but it is a substantial interest to the extent of qualifying them to bring this action.

Now the question is, what does the Court do about it?

I find that the whole record shows rather strongly that these defendants are intentionally violating the law and knowingly subverting the law in the manner of their operations, and they are entitled to little sympathy from the Court because of that. I have a considerable greater sympathy with the travelers. It is true that the travelers presumably perjured themselves, but the last affidavit by Mr. Pendry indicates that a considerable amount of this perjury took place under the gun of either being able to climb aboard the aircraft or not, and I think also that a considerable amount of this perjury was induced. In any event, the travelers are entitled to a little more sympathy from the Court, and I am bearing that in mind in making the Order that I propose to make.